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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM GEORGE FOX, Defendant and Appellant.	A122951 (Sonoma County Super. Ct. No. SCR536634)

Following the denial of a motion to suppress evidence, appellant William George Fox pleaded no contest to a charge of being a felon in possession of a firearm. On appeal, he contends the trial court erred in denying his motion to suppress. He also argues that a probation condition precluding him from associating with gang members is unconstitutionally vague. We modify the challenged probation condition but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On April 12, 2007, officer Tommy Isachsen of the Santa Rosa Police Department signed an affidavit in support of a warrant to search premises located on Ware Avenue in Santa Rosa. Officer Isachsen's affidavit contained the following facts:

At around 4:30 p.m. on April 10, 2007, a Santa Rosa police officer was on patrol when he saw a man later identified as Tyrell Myers walking along a street with a woman. Myers was carrying a plastic grocery bag and a large jacket. When Myers saw the officer, he abruptly turned around, walked the other direction, and turned onto another street. The officer followed in his vehicle, stopped the car in the middle of the street, and called to Myers to ask if everything was alright. Myers responded but appeared extremely nervous,

was sweating profusely, licking his lips, and moving constantly—all "symptoms [of] potential central nervous system stimulant influence, particularly methamphetamine."

The officer got out of his patrol car and began to approach Myers. Myers said, "Fuck you," discarded the items he was carrying, and fled on foot. The officer briefly pursued Myers in his patrol car, which he used to block Myers's path. When Myers appeared to be reaching for something in his pocket, the officer drew his gun and ordered Myers to get his hands out of his pocket. Myers fled and ran into a field. The officer pursued Myers for approximately 100 yards then overtook and arrested him. A search incident to the arrest led to the discovery of 0.4 grams of methamphetamine and a glass smoking pipe. A loaded .32 caliber semi-automatic handgun was found in the field through which the officer had chased Myers. Myers later admitted discarding the handgun in the field, claiming he had found it in a field near a church in Santa Rosa. Records showed that the handgun had been stolen from a Healdsburg resident, who had contacted the Sonoma County Sheriff's Department a little over a year earlier, on March 8, 2006, to report that 21 firearms had been taken from his residence during a burglary.

Although at the time of his arrest Myers denied membership in a gang, he had admitted membership in the Norteno gang to police on two previous occasions and had been seen in the presence of known Norteno gang members on three separate occasions. Norteno gang members wear the color red and favor South Pole brand clothing to identify with the South Park area of Santa Rosa. Myers was wearing a red South Pole brand t-shirt when he was arrested.

On the basis of Officer Isachsen's affidavit, on April 14, 2007, a magistrate authorized a search of Myers's residence on Ware Avenue in Santa Rosa. The warrant authorized the seizure of the following: any evidence of street gang membership or affiliation with any gang; any handgun, pistol, or firearm; any writings depicting gang activity; and any audiocassettes or CD's with gang graffiti or monikers on them.

Santa Rosa police officers conducted a search of Myers's residence pursuant to the warrant. After finding 5.2 grams of heroin in the kitchen area, the police brought a "narcotics dog" onto the premises. The dog alerted the officers to something under a

mattress inside a bedroom occupied by appellant William George Fox and his ex-girlfriend. Police officers found a handgun beneath the mattress.

On June 23, 2008, the Sonoma County District Attorney filed an information charging appellant with possession of a firearm by a felon. (Pen. Code, § 12021, subd. (a)(1).) Appellant filed a motion under Penal Code section 1538.5 to suppress evidence seized during the search of the Ware Avenue premises. In his suppression motion, appellant contended the search warrant was invalid because it did not identify with particularity the items to be seized. Following a hearing held on July 28, 2008, the court denied the motion.

On the same day the court denied the suppression motion, appellant pleaded no contest to the charge of being a felon in possession of a firearm. He also pleaded no contest to methamphetamine use (Health & Saf. Code, § 11550, subd. (a)), a misdemeanor, in another case. The trial court sentenced appellant to the upper term of three years in state prison, suspended execution of the sentence, and placed appellant on probation for three years subject to various terms and conditions. Appellant filed a timely notice of appeal.

DISCUSSION

I. MOTION TO SUPPRESS EVIDENCE

Appellant contends the search warrant authorizing the search of his home was constitutionally defective in two respects. First, he claims it was not based upon probable cause because the information was stale. Second, he argues the warrant authorized an overbroad search because it permitted the seizure of firearms that were not described with sufficient particularity.

A. *Standard of Review*

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The defendant bears the burden of establishing the invalidity of a search warrant. (*People v. Garcia* (2003) 111 Cal.App.4th 715, 720.) "[T]he magistrate's determination will not be overturned unless the supporting affidavit fails as a matter of law to support the

finding of probable cause. [Citations.] Doubtful or marginal cases are resolved in favor of upholding the warrant. [Citations.]" (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.) "Probable cause exists when the information on which the warrant is based is such that a reasonable person would believe that what is being sought will be found in the location to be searched." (*People v. Stanley* (1999) 72 Cal.App.4th 1547, 1554.) "On appeal, we accord the magistrate's determination great deference, inquiring only whether there was a substantial basis to conclude that the warrant would uncover evidence of crime. [Citation.]" (*Ibid.*)

B. *Staleness*

"Stale information in a search warrant affidavit does not establish present probable cause for a search. [Citation.]" (*People v. Hirata* (2009) 175 Cal.App.4th 1499, 1504.) "No bright-line rule defines the point at which information is considered stale. [Citation.] Rather, 'the question of staleness depends on the facts of each case.' [Citation.] 'If circumstances would justify a person of ordinary prudence to conclude that an activity had continued to the present time, then the passage of time will not render the information stale.' [Citation.] [¶] Courts have upheld warrants despite delays between evidence of criminal activity and the issuance of a warrant, when there is reason to believe that criminal activity is ongoing or that evidence of criminality remains on the premises. [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 163-164.)

Appellant contends the information in the affidavit supporting the search warrant was stale, noting that the guns had been stolen over a year before the issuance of the warrant. Consequently, appellant reasons, probable cause to believe that more of the stolen weapons were in Myers's residence was lacking. We disagree.

The information about the stolen guns was not stale. Myers had one of the stolen firearms in his possession on the day he was arrested, just two days before Officer Isachsen signed the affidavit supporting the search warrant, and just four days before officers searched Myers's residence. Given that Myers still had in his possession one of the guns stolen from a Healdsburg residence a little more than a year earlier, it was reasonable to believe he may have had more of the stolen guns at his home, particularly since there was no indication that any of the other stolen guns had been recovered. As our Supreme Court

stated in *People v. Carrington, supra,* 47 Cal.4th at p. 163, "[w]hen property has been stolen by a defendant and has not yet been recovered, a fair probability exists that the property will be found at the defendant's home. [Citations.]" Thus, the affidavit supported a finding of probable cause that more of the stolen firearms could be found in Myers's residence.

Even if the showing of probable cause was deficient, suppression of the seized evidence is nevertheless unjustified here because the officers who executed the search warrant reasonably believed the warrant was properly issued. In *United States v. Leon* (1984) 468 U.S. 897 (*Leon*), "the high court held that where the police officers act in objectively reasonable reliance on a search warrant that is issued by a detached and neutral magistrate but is later found to be invalid for lack of probable cause, the deterrent effect of the exclusion is insufficient to warrant the exclusionary rule's application. [Citation.]" (*People v. Willis* (2002) 28 Cal.4th 22, 30.) This exception to the exclusionary rule rests in part upon the understanding that the sanction of excluding evidence seized in violation of a defendant's Fourth Amendment rights is " 'designed to deter police misconduct rather than to punish the errors of judges or magistrates.' " (*Ibid.*) However, the good faith exception to the exclusionary rule established in *Leon* does not protect "an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' [Citations.]" (*Leon, supra,* 468 U.S. at p. 923.) The relevant question is whether "a well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant) . . . ." (*People v. Camarella* (1991) 54 Cal.3d 592, 596.) If the officer "reasonably could have believed that the affidavit presented a close or debatable question on the issue of probable cause" (*id.* at p. 606), the sanction of suppression is inappropriate.

Here, the officer who prepared the affidavit had reliable information from other police officers that Myers was active in the Norteno street gang. At the time of his arrest, Myers possessed methamphetamine and a stolen weapon. From this information it was reasonable to conclude that more guns and indicia of gang membership could be found in Myers's residence. Therefore, the officers who executed the search warrant could have reasonably relied upon the magistrate's assessment of probable cause.

Appellant contends the *Leon* good faith exception is inapplicable in this case because the magistrate abdicated his judicial authority and "rubber-stamped" the warrant. (See *Leon, supra,* 486 U.S. at p. 923 [good faith exception does not apply where magistrate wholly abandons judicial role].) As support for this contention, appellant refers to certain isolated phrases in the warrant in which the magistrate stated in the first person that "I request permission" to seize certain items. Appellant asserts the magistrate abandoned his role as a neutral and detached judicial officer and instead acted as a police officer. We disagree. The use of the first person in the warrant was an obvious oversight by its drafter—the police officer affiant—and the magistrate who signed it. Such clerical oversights do not support a claim that a magistrate has abdicated his or her judicial neutrality and detachment. (See *Massachusetts v. Sheppard* (1984) 468 U.S. 981, 989-990 [suppressing evidence because judge failed to make clerical corrections to warrant would not serve deterrent function of exclusionary rule].)

C. *Particularity*

"The United States Constitution as well as the Constitution and statutory law of California require that a search warrant describe with particularity the place to be searched and the items to be seized. (U.S. Const. 4th Amend.; Cal. Const., art. I, § 13; Pen. Code, § 1525.)" (*People v. Alvarez* (1989) 209 Cal.App.3d 660, 664.) "The particularity requirement precludes 'a general, exploratory rummaging in a person's belongings' [citation] and 'the seizure of one thing under a warrant describing another' [citation]. As the Supreme Court explained, 'By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.' [Citation.]" (*People v. Balint* (2006) 138 Cal.App.4th 200, 206.)

Appellant contends the warrant was defective because it failed to describe with particularity the guns to be seized. Specifically, appellant challenges that part of the warrant authorizing the seizure of "[a]ny handgun, pistol, or firearm." He contends the authorization was unconstitutionally broad because it permitted the seizure of weapons other than those stolen the previous year from a residence in Healdsburg.

Appellant takes a much too narrow view of the facts giving rise to probable cause to search Myers's residence. The search was not justified only because it was suspected Myers might still have in his possession more of the firearms stolen a year earlier. Instead, Myers was investigated based on probable cause to believe he was an active member of a criminal street gang. (See Pen. Code, § 186.22 et seq.) Any weapons he may have possessed were relevant to the issues of whether his participation was ongoing (*id.*, § 186.22, subd. (a)) and whether he had committed felonies for the benefit of the gang (*id.*, § 186.22, subd. (b)). In addition, it is a criminal offense to supply weapons to members of street gangs for their use in the commission of a gang-related felony. (*Id.*, § 186.28, subd. (a)(1).) Because officers had cause to seize all firearms Myers had in his possession, not just the stolen ones, the challenged warrant was not overbroad or lacking in particularity.

Even if the warrant were overbroad, the error would not be fatal. The warrant in this case permitted the seizure of all evidence relating to Myers's gang activities. These provisions of the warrant, which are unchallenged by appellant, permitted the search conducted by police that uncovered appellant's gun. (See *Horton v. California* (1990) 496 U.S. 128, 135 [seizure justified where police officer inadvertently comes across incriminating object even though otherwise valid search is not directed against accused].)

II. PROBATION CONDITION

The trial court placed appellant on probation subject to the condition that "[h]e's not to associate with any gang members." Appellant contends the condition is unconstitutionally vague in two respects. First, he asserts the condition does not require that appellant have personal knowledge that the persons with whom he may not associate are gang members. Second, he argues the condition does not define the term "gang." Appellant urges that we modify the probation condition to remedy the vagueness problems.

The Attorney General concedes that the challenged probation condition is unconstitutionally vague for the reasons appellant has identified. (See *In re Vincent G.* (2008) 162 Cal.App.4th 238, 246 [word "gang" is on its face uncertain]; *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629 [probation condition overbroad that prohibits defendant from associating with persons not known to him to be gang members].) The Attorney General also agrees with appellant that the condition of probation may be

modified, as in *In re Vincent G., supra*, 162 Cal.App.4th at pp. 247-248, to prohibit appellant from associating with any person he knows to be a gang member, with the term "gang" defined by reference to Penal Code section 186.22. The Attorney General's concession is well taken. We agree the probation condition should be modified as proposed.

DISPOSITION

The condition of probation concerning association with gang members is modified as follows: "You are not to associate with any person whom you know, or whom the probation officer informs you, is a gang member. For purposes of this condition of probation, the word gang means a criminal street gang as defined in Penal Code section 186.22, subdivision (f)." Except as so modified, the judgment is affirmed.

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McGuiness, P.J.

We concur:

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Siggins, J.

_____
Jenkins, J.